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IN THE

Supreme Court Of The United States

October Term, 1993

JUDY MADSEN, *et al.*,
Petitioners,

v.

WOMEN'S HEALTH CENTER, INC., *et al.*,
Respondents.

On Writ of Certiorari
To The Supreme Court of Florida

BRIEF FOR THE SOUTHERN CENTER FOR LAW & ETHICS, CARE NET, BIRMINGHAM 1000 FOR LIFE, INC., CONNIE CRITTENDEN, AND GINNY SHIRLEY, AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

The Southern Center for Law and Ethics is a nonprofit, publicly funded, tax-exempt corporation founded in 1985 and based in Birmingham, Alabama. Paramount to the Center's purpose is to develop an understanding of the relationship between law and religion. The Center's activities include interaction and instruction with interested law students,

lawyers, and members of the academic community, publication of articles and a journal of theology and law, providing legal counsel and filing *amicus curiae* briefs on a variety of public issues, from the free speech rights of college professors to the legal status of midwives, related to the Center's purpose.

The Center is interested in protecting the First Amendment free speech rights of those individuals who engage in peaceful, lawful speech and assembly in front of and near abortion clinics. The Center is also interested in ensuring that women considering abortion have the opportunity to receive and respond to offers of assistance, care, and information that can assist some of them in choosing childbirth.

Care Net is a ministry of the Christian Action Council, a nonprofit, charitable organization, founded in 1975 and incorporated in the District of Columbia. Care Net trains pregnancy care center workers, church members, and individuals to provide practical and compassionate care to women in unplanned pregnancies. The over 450 Care Net pregnancy care centers in the United States and Canada offer free pregnancy tests; birth, abstinence, and post-abortion counseling; housing; parenting classes; and help with financial, medical, and material needs. Studies have shown that a majority of women who have chosen abortion would have preferred positive alternatives and Care Net pregnancy care centers offer women these alternatives. Were it not for the non-coercive assistance offered by sidewalk counselors, some women would never learn about the help that is available. Thus, Care Net believes that restricting the speech of sidewalk counselors would deny women access to information they need to make informed and reasoned decisions.

The Birmingham 1000 for Life, Inc., is a nonprofit, charitable organization whose purpose is to provide financial assistance for obstetric and hospital care to those who have been abortion-minded and have lacked either medical insurance or the means to pay for obstetric and hospital care. The Birmingham 1000 for Life, Inc., has also published and provided educational material on abortion risks, fetal development, and prolife alternatives to abortion. The Birmingham 1000 for Life, Inc., is particularly concerned that sidewalk counselors have the opportunity to lawfully and peacefully offer women considering abortion the assistance, care, and information that Birmingham 1000 for Life, Inc., provides.

Connie Crittenden and Ginny Shirley are individuals who have, on a volunteer basis, engaged in peaceful and lawful sidewalk counseling. These individuals wish to maintain their First Amendment rights to lawfully and peacefully offer pregnant women considering abortion assistance, care, and information that will enable some of them to choose birth, and life, for their unborn children.

Counsel for all parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Upholding the three-hundred foot ban on approaching and thirty-six foot buffer zone would have the effect of destroying, on a national scale, the practice of sidewalk counseling. Sidewalk counseling constitutes an offer of assistance, care, and information directed to pregnant women and their companions in the vicinity of an abortion clinic. The amended injunction's three-hundred foot ban on approaching and thirty-six foot buffer zone make it impossible for sidewalk counselors to reach women with this offer, and hence constitutes a ban on this peaceful form of expression and assistance.

The Florida Supreme Court erroneously held that a ban on sidewalk counseling was constitutionally permissible because sidewalk counseling is directed at particular clinic patients rather than the general public. Women considering abortion, however, are not a captive audience. The rights of such women to refuse the information, counseling, and assistance offered by sidewalk counselors can be secured simply by ensuring women the basic right of ingress and egress to and from the clinics. Words addressed to a particular person are as much within the free speech clause as a picket sign addressed to the general public.

The amended injunction destroys the free speech rights of all prolife individuals based on alleged wrongdoing by a few. The amended injunction applied to several associations or campaigns, to six named individuals, and to "all persons acting in concert or participation with them . . . ." The amended injunction was applied by police and the trial judge to prolife individuals, and only prolife individuals, regardless of whether those prolife individuals had violated the original injunction, committed any wrongful acts, or knew or were involved with any of the named individuals. The amended injunction could not have been limited to those who had violated the original injunction, as the judge generally failed to identify those persons who had violated the original injunction. The amended injunction in practice defined all prolife individuals in the vicinity of the clinic as "acting in concert or participation" with those subject to the injunction.

The weak factual and evidentiary foundation of the injunction invites similar injunctions at abortion facilities around the country. The trial judge did not find a single instance of a clinic blockade. The problems of noise and congestion were found by the trial judge to have been produced by both sides, and yet the judge only enjoined the activities of prolife individuals and associations. The trial judge improperly relied on offensive, but constitutionally-protected speech. The trial judge incorrectly relied on the statements of a staff physician claiming that prolife speech caused higher levels of anxiety and hypertension. The attorney for the prolife individuals was denied access to the names and medical records of the clinic patients who allegedly suffered these negative consequences, and thus lacked any effective means to confront or cross examine this witness, who was an employee or contractor of the clinic seeking the injunction. Justifying prohibitions of prolife speech with the generalized testimony of abortionists that such speech has negative "health" effects or causes "anxiety" is inconsistent with this Court's allowance of informed consent statutes. *See Casey*, 112 S. Ct. at 2822-26.

Sidewalk counseling is closely associated with the broader movement of prolife individuals and groups offering services to pregnant women and their children. The service segment of the prolife movement offers counseling, pregnancy tests, housing, medical care, clothing, furniture, legal assistance, and other forms of aid to approximately 700,000 women each year. Sidewalk counseling for many women serves as a point of entry to the services offered by the local prolife agencies, and it is these services which enable many women to choose childbirth over abortion.

Sidewalk counseling most often exists completely independently of either clinic blockades or legal protests, largely because sidewalk counselors believe that it is easier to approach women under calmer circumstances. The methodology of sidewalk counseling is generally to be friendly, helpful, and nonoffensive. Sidewalk counselors are sustained in their efforts by a steady stream of women who respond positively to their offers of assistance, care, and information, and who are often quite grateful to the sidewalk counselors for reaching them when they were on the verge of aborting.

This Court has recognized that prolife speech addressed to women considering abortion can further the liberty and health of pregnant women. *See Casey*, 112 S. Ct. at 2821-26 (prolife speech can avoid "devastating psychological consequences" of discovering "impact on the fetus" after abortion, and can ensure a "more informed and deliberate" exercise of woman's liberty). This Court has correctly assumed that abortion counseling as practiced in abortion clinics typically fails to apprise clients of information which most women would find morally relevant to the abortion decision. The amended injunction forbids *private* parties located on a public forum from engaging in a kind of speech that this Court permits even to the *government within* the abortion clinic.

ARGUMENT

I. Upholding the Three-Hundred Foot Ban on Approaching and Thirty-Six Foot Buffer Zone Would Have the Effect of Destroying, on a National Scale, the Practice of Sidewalk Counseling.

A. The Amended Injunction was Specifically Directed Against the Practice of Sidewalk Counseling.

The trial court's amended injunction enjoined, in an area within three-hundred feet of the clinic, prolife individuals from "physically approaching any person seeking the services of the Clinic unless such person indicates a desire to communicate by approaching or by injuring [sic] of the respondents."[1] The amended injunction referred to this "desire to communicate" as an "invitation" to the form of communication called "sidewalk counseling."[2] The amended injunction also prohibited sidewalk counseling "within the 36 foot buffer zone" even if desired and invited by the client.[3]

B. The Amended Injunction Made Sidewalk Counseling Impracticable.

The essence of sidewalk counseling, as described in detail in section II of this brief, *infra*, is an attempt to reach women considering abortion with an offer of emotional, spiritual, and material assistance toward choosing birth over abortion, and with information relevant to the abortion decision. The methodology of sidewalk counseling is to approach pregnant women in the vicinity of the abortion facility in a friendly, nonthreatening manner. Toward this end, sidewalk counselors generally do not carry picket signs, sing, shout, or otherwise engage in demonstrative behavior directed at the general public. *See* section II, *infra*.

It is impossible to sidewalk counsel without approaching the clinic's potential clients, because the essence of sidewalk

[1] *See Operation Rescue v. Women's Health Center, Inc*, 626 So. 2d 664, 680 (1993).

[2] *Id.*

[3] *See id.*

counseling is an intervention that involves an offer of information and assistance. The portion of the injunction forbidding "approaching" therefore effectively forbids sidewalk counseling. If the trial judge envisioned that women approaching the clinic would have the opportunity either to accept or refuse sidewalk counseling, then the trial judge erred either in writing the injunction or in his understanding of sidewalk counseling. Since sidewalk counselors are not demonstrating against abortion, it would be difficult or impossible for women passing near them to know who they were or what they intended to offer. It is vain to expect that sidewalk counseling can exist without sidewalk counselors "approaching" potential clinic clients.

The 36 foot buffer zone effectively prohibits sidewalk counseling in the immediate vicinity of the clinic, even if invited and desired by potential abortion clients. This ban interferes with the free speech rights of sidewalk counselors *and* women considering abortion.

The alternative of sidewalk counseling beyond the three-hundred foot zone is impracticable, because at such a distance it cannot be determined whether vehicles or pedestrians are going to the abortion facility. This destroys the essence of sidewalk counseling, which is an offer of information and assistance to women considering abortion, rather than a generalized protest against abortion.

C. The Decision of the Florida Supreme Court Affirming the Amended Injunction's Ban on Sidewalk Counseling Erroneously Held That Such Ban Was Constitutionally Permissible Because Sidewalk Counseling is Directed at Particular Clinic Patients Rather Than the Public at Large.

The Florida Supreme Court interpreted this Court's holding in *Frisby v. Schultz*, 487 U.S. 474 (1988), to permit a ban on "picketing . . . directed at particular Clinic . . . patients."[4] This holding is both factually and legally erroneous. First, it is

[4] *Id.* at 672.

factually erroneous to include sidewalk counseling within the broader category of "picketing." Sidewalk counselors generally do not march, hold signs, sing, or yell, but rather attempt to offer information and assistance to women considering abortion. Second, women considering abortion are not a "captive" audience, and thus the rationale of *Frisby* permitting a ban on "targeted" picketing is inapplicable. The rights of such women to refuse the information, counseling, and assistance offered by sidewalk counselors can be secured simply by ensuring women the basic right of ingress and egress to and from the clinics. Third, even in *Frisby* the Court permitted the prolife message to be given to residents within homes by walking in front of a group of homes; only "targeted" picketing in front of only one home could be banned. The injunction at issue in this case, by contrast, forbids all communication and even presence within the 36 foot zone, even if invited and desired by the pregnant women, and effectively destroys sidewalk counseling by banning "approaching" within 300 hundred feet.

The rationale of the Florida Supreme Court implies that the free speech clause of the Constitution does not protect, or protects with significantly less rigor, even peaceful, nonthreatening speech directed at particular individuals. If freedom of speech is to be a meaningful right, however, it must include the right to address particular individuals, or classes of individuals. Surely words addressed to a particular person, whether friend, neighbor, or stranger, are as much within the free speech clause as a picket sign addressed to the general public.

If this Court accepts the Florida Supreme Court's rationale, it would mean that sidewalk counseling as a form of speech would receive little or no constitutional protection. This rationale would be used by abortion clinics to bring an end to sidewalk counseling.

D. The Amended Injunction Destroys the Free Speech Rights of All Prolife Individuals Based on Alleged Wrongdoing by a Few.

The amended injunction was based on a finding that a prior injunction protecting ingress to the abortion facility had been violated. The trial court's findings, however, generally failed to identify the persons responsible for violating the prior injunction.[5] Moreover, the noise and congestion found objectionable by the trial court were produced by both prolife and prochoice individuals,[6] and yet the amended injunction only applied to prolife individuals.

The amended injunction applied to several associations or campaigns, to six named individuals, and to "all persons acting in concert or participation with them . . . ."[7] The amended injunction was applied by the police and trial judge to prolife individuals, and only prolife individuals, regardless of whether those prolife individuals had violated the original injunction, committed any wrongful acts, or knew or were involved with any of the named respondents.[8] Indeed, the amended injunction could not reasonably have been limited to those who had violated the original injunction, given the fact that the trial judge, despite receiving substantial evidence, had generally failed to identify those who had violated the original injunction. The Eleventh Circuit found that persons were "designated for arrest by clinic workers and police officers because they were perceived to be 'pro-life.'"[9] Thus, in practice the amended injunction defined all pro-life individuals in the vicinity of the abortion clinic as "acting in con-

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[5] Respondent Cadle was essentially the only person identified as engaging in specific activity. By contrast, the trial court would not even assert that all of the named respondents were present within the vicinity of the clinic. *See Operation Rescue*, 626 So. 2d at 677 (crowd included "some of the named respondents").

[6] *Operation Rescue*, 626 So. 2d at 677 (finding B on composition of crowd); *id.* (finding C on noise).

[7] *Operation Rescue*, 626 So. 2d at 679.

[8] *Cheffer v. McGregor*, 6 F.3d 705, 711 & n.11 (11th Cir. 1993).

[9] *Cheffer*, 6 F.3d at 711 n.11.

cert or participation" with the respondents. To be prolife, and to be present near the clinic, was to be guilty.[10]

Thus, the amended injunction effectively banned peaceful, non-threatening acts by all prolife individuals, including sidewalk counselors, based on alleged wrongdoing by a few.

E. The Weak Factual and Evidentiary Foundation Of the Amended Injunction Invites Similar Injunctions at Abortion Facilities Around the Country.

The factual and evidentiary foundation of the amended injunction is surprisingly weak, given the extreme breadth of the enjoined activities. The judge did not find a single instance of a clinic blockade, or of a patient or employee of the clinic being unable to enter or leave the facility. The trial judge objected to the noise volume of the "gatherings" in front of the clinic, but noted that the shouting, yelling, and boom boxes were employed by persons of both sides.[11] The trial judge complained that the crowds slowed vehicular traffic passing by and into the clinic property, but noted that the crowds consisted of persons on both sides of the abortion issue, as well as police and media.[12] Thus, the overall problems of noise and congestion were produced by both sides, and yet the judge only enjoined the activities of prolife individuals and associations. The activities found objectionable by the judge did not actually prevent ingress or egress to the abortion facility, and the judge was not concerned enough with noise and congestion to stop all persons, regardless of ideology, from engaging in disruptive activities.

[10] This conclusion is underscored by the trial court's finding that the crowd included "some of the named respondents in this cause; some persons who were loosely associated with the respondents' organizations, Operation Rescue and Operation Goliath." *Operation Rescue*, 626 So. 2d at 677 (finding B). The trial court failed to articulate what it meant to be "loosely associated" with the respondent organizations, and failed to include as persons present those who were prolife but had no association with the respondent organizations. Thus, the trial court appeared to assume that all prolife persons present in the vicinity of the clinic were somehow associated with or in concert with the respondent individuals and/or associations, and thus were somehow responsible for alleged violations of the injunction.

[11] *Operation Rescue*, 626 So. 2d at 677 (finding C).

[12] *Id.* at 677.

The trial court was offended by a few particularly strong statements made to clinic workers and others. Such statements included invoking "the wrath of God by shouting, 'I pray that God strikes you dead now;'" "providing literature identifying the clinic employee as a 'baby killer;'" and shouting "child murderer" and "baby killer" to the abortionist.[13] However offensive such speech might be (even to many prolife individuals), it seems well within the kinds of offensive speech protected by this Court in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982). Thus, much of what the judge cited as supportive of the amended injunction consisted of constitutionally protected speech that appeared to offend abortion personnel and the judge. This willingness to enjoin constitutionally-protected speech offensive to the judge is itself constitutionally offensive. As this Court stated in *Claiborne Hardware*, 458 U.S. at 911:

> Petitioners were engaged openly and vigorously in making the public aware of respondent's . . . practices. Those practices were offensive to them, as the views and practices of petitioners are no doubt offensive to others. But so long as the means are peaceful, the communication need not meet standards of acceptability.

If this Court accepts as adequate to support the amended injunction the findings of the trial court, it will invite clinics and judges throughout the nation who are similarly offended to selectively enjoin prolife speech.

The most significant finding of the trial court in support of the injunction was the trial court's recitation of possible damage to the health of clients. The trial court stated:

> This [staff] physician . . . testified that he witnessed the demonstrators running along side of and

[13] *Id.*

> in front of patients' vehicles, pushing pamphlets in car windows to persons who had not indicated any interest in such literature. As a result of patients having to run such a gauntlet, the patients manifested a higher level of anxiety and hypertension causing those patients to need a higher level of sedation to undergo the surgical procedures, thereby increasing the risk associated with such procedures. The doctor also testified that the noise of singing, chanting, shouting and yelling could be heard through the walls of the clinic and caused stress in the patients during surgical procedures and while recuperating in the recovery rooms. The doctor also testified that he observed some patients turn away from the crowd in the driveway to return at a later date. He testified that such delay in undergoing the procedures also increased the risk associated therewith.[14]

First, it should be recognized that the testimony of a "staff physician" is not disinterested or unbiased, as such person is an employee or contractor of the clinic seeking the injunction. In addition, an abortionist would have a natural ideological antipathy toward prolife protestors. In the present case, the attorney for the prolife respondents was denied access to the names and medical records of the clinic patients who allegedly suffered these negative consequences. Thus, the attorney lacked any effective means to confront or cross examine this clearly hostile witness.[15] If clinics can obtain broad injunctions based on the unsubstantiated conclusions and allegations of their medical personnel that protests caused negative health effects, then virtually every clinic in the nation will obtain such injunctions.

In the present case, the bias of the physician is illustrated by his characterization of sidewalk counselors as "pushing

[14] *Id.* at 678 (finding I).

[15] Hearing Record, at 31-39, 88-99, *Women's Health Center, Inc. v. Operation Rescue*, Circuit Court of the Eighteenth Judicial Circuit in and for Seminole County, Florida, March 22, 1990 (Testimony of Dr. Frank Snydle).

pamphlets in car windows."[16] The trial judge more neutrally described sidewalk counselors as "attempting to get the attention of the vehicles' occupants to give them anti-abortion literature and to urge them not to use the clinic's services."[17] Such bias is particularly important, as a slight recharacterization or distortion of prolife activities can make innocuous activities appear sinister or threatening. A smile can be described as a "grimace," or an offer of assistance described as an "intrusion."

Second, the physician's testimony that patients were harmed because they left to return at a later date, cannot be the basis of an injunction. Clinic ingress and egress was consistently available, so that the decision to leave was a voluntary reaction to the demonstrations. The fact that a demonstration induces some women to ponder the abortion decision for a longer time can hardly be the reason to enjoin such a demonstration. Public debate cannot be limited to moot issues, or issues that have no personal application. Even offensive speech can serve the positive function of making individuals treat the abortion decision with greater seriousness, to ensure that this irrevocable act is not regretted.

Third, the physician's testimony that prolife demonstrators caused some patients higher levels of anxiety and hypertension, requiring a higher level of sedation, is inadequate to enjoin such activity. Initially, it is difficult to know how the physician would know which activities caused these higher levels of anxiety. The trial judge had found that prochoice advocates were loud and confrontational, and that the local police had at times erected temporary barriers to separate "the partisan groups."[18] It seems likely that the tension and noise created by the confrontation between the opposing sides, rather than the actions of one side, would have produced the alleged higher levels of anxiety and hypertension. The abortion-physician would be highly unlikely to note the

[16] *Operation Rescue*, 626 So. 2d at 678 (finding I).

[17] *Id.* at 677 (finding E).

[18] *Id.* (finding D).

negative effects of his or her own partisans on clients. In addition, the physician's presumption that a higher level of anxiety is entirely negative echoes the view of this Court in *Thornburgh v. ACOG*, 476 U.S. 747, 762 (1986), that pregnant women should be protected from prolife speech which heighten their "anxiety." However, this Court in *Planned Parenthood v. Casey* was willing to accept the heightened anxiety which might accompany receipt of prolife speech, in order to avoid the "devastating psychological consequences," *id.* at 2823, of an ill-considered or uninformed abortion decision. Justifying prohibitions of prolife speech with the generalized testimony of abortionists that such speech had negative "health" effects is inconsistent with this Court's allowance of informed consent statutes. *See* section V, *infra*.

Fourth, this Court has repeatedly insisted that the Constitution protects even offensive speech. *See, e.g., Claiborne Hardware*, 458 U.S. at 911. Offensive speech must quite often produce "a higher level of anxiety." "Offensive," moreover, is in the eye of the beholder. A simple statement of truth—that abortion kills a live fetus—can be perceived as quite "offensive" to a physician in the business of performing abortions, or to a woman planning to undergo an abortion. To allow such offense to be repackaged as a "health" concern, and then used as a basis to enjoin prolife speech, would invite wholesale viewpoint-specific censorship of prolife speech.

It should be apparent to this Court that virtually every abortion facility could introduce testimony from their medical personnel to the effect that prolife speech has, in at least some instances, caused "a higher level of anxiety and hypertension" in some patients. Thus, if this Court holds such testimony to be an adequate foundation to support an injunction preventing sidewalk counseling, then sidewalk counseling will be virtually banned as an activity in America. Before this Court endorses such a serious diminution of free speech rights, it should seek to understand the nature of the speech that would be censored.

II. Sidewalk Counseling is an Attempt to Reach Women Considering Abortion with an Offer of Emotional, Spiritual, and Material Assistance Toward Choosing Birth over Abortion, and with Information Relevant to the Abortion Decision, and Therefore is Fundamentally Different from Protest Activities Directed at the General Public.

Sidewalk counseling can be defined as an offer of emotional, spiritual, and material assistance toward choosing birth over abortion, and of information relevant to the abortion decision, addressed to pregnant women and their companions within the vicinity of an abortion facility. The techniques of sidewalk counseling include: (1) the offering of services, including medical care, pregnancy tests, housing, infant and maternity clothing, and furniture, through referral to crisis pregnancy centers, physicians, and networks of prolife support; (2) expressions of care and concern for pregnant women, their unborn children, and their companions; and (3) the provision of information about abortion, alternatives to abortion, the particular abortion facility in question, and fetal development, through speech and literature distribution. The primary purpose of sidewalk counseling is to offer pregnant women considering abortion assistance, care, and information that will enable some to choose childbirth over abortion. A secondary purpose of sidewalk counseling is to offer assistance toward personal healing to women who choose to abort.

Sidewalk counseling must be carefully distinguished from both lawful protest activities, such as picketing, and from illegal protest activities, such as clinic blockades. Sidewalk counseling is not a protest activity, and its message is aimed primarily at women considering abortion, rather than the general public. Sidewalk counseling does not seek, as do clinic blockades, to forcefully prevent or delay women from aborting, but rather seeks to offer women assistance, care, and information that will enable some to choose voluntarily childbirth over abortion.

Sidewalk counselors generally view abortion as a self-destructive act for the woman, and therefore sincerely believe that they are assisting women by providing them with the services and information to enable them to avoid abortion. Sidewalk counselors also generally view abortion as the killing of an innocent human person, and hope through their assistance to the mother to save the life of the child. Sidewalk counseling therefore is generally described by its practitioners as a "service" or "ministry" to pregnant women and their children.

Sidewalk counseling is closely associated with the broader movement of prolife individuals and groups offering services to pregnant women and their children. The service segment of the prolife movement offers counseling, pregnancy tests, housing, medical care, clothing, furniture, legal assistance, and other forms of aid to approximately 700,000 women each year. This service is offered primarily through approximately 3,500 prolife agencies. There are several national networks of such agencies, the largest of which, Birthright, has existed since 1968; a number of the agencies, however, are independent. These agencies, whether independent or nationally affiliated, are primarily dependent on local support to supply the goods and services they offer. The philosophies and methods of these 3,500 local prolife agencies vary, but all of them represent an attempt to assist women and children through the provision of care, goods, and services. These 3,500 local agencies are primarily staffed by volunteers, a majority of whom are women.[19]

Sidewalk counseling serves as a bridge between local prolife service agencies and pregnant women considering abortion. Sidewalk counseling for many women serves as a point of entry to the services offered by local prolife agencies, and it is these services which in many instances enable pregnant women to choose childbirth over abortion.

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[19] *See* Frederica Mathewes-Green, *Unplanned Parenthood, Easing the Pain of Crisis Pregnancy*, Policy Review 28, 29 (Summer 1991) (describing prolife agencies and networks involved in offering services to women with crisis pregnancies).

Sidewalk counseling's intimate link with the service sector of the prolife movement contrasts with its ambivalent relationship to certain other sectors of the prolife movement. Although some sidewalk counselors have worked in concert with clinic blockades, many other sidewalk counselors disagree with the methods of Operation Rescue, or prefer not to be associated with clinic blockades. Although some sidewalk counselors sometimes work in concert with legal protests and picketing, many other sidewalk counselors avoid such links, or prefer to counsel in the absence of protests. Sidewalk counseling most often exists completely independently of either blockades or protests, largely because sidewalk counselors believe that it is easier to approach and counsel women under calmer circumstances. For example, one sidewalk counseling training manual explains that:

> Picketing is counter-productive to sidewalk counseling. Signs are usually a turn-off to a mother coming for an abortion, and she is less likely to take your literature or talk to you.[20]

Sidewalk counselors are often more frequent and regular in their activities than are protestors or those who blockade clinics. Sidewalk counselors wish to reach the particular women considering abortion and therefore attempt to be present at each local abortion clinic, in small groups, on the days when abortions are performed. Sidewalk counselors are generally volunteers who take time out from their other responsibilities to counsel in front of the clinics a few hours each week or month. Most sidewalk counselors are women, and a significant number are motivated, in part, out of their own negative experiences with abortion. Sidewalk counselors generally are loosely organized on a local basis to schedule, train, and protect one another. Sidewalk counselors who be-

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[20] Columbia Sidewalk Counseling Guidelines, 3-4. This booklet arises from the Columbia, South Carolina area but is "partially adapted from [the] Karen Black seminar." *Id.* (cover). Karen Black's approach to sidewalk counseling is used by sidewalk counselors in a variety of locations, including Birmingham, Alabama.

lieve their work to be hindered, rather than helped, by blockades or protests may nonetheless feel a duty to be present at such events, out of their generalized sense of obligation to ensure that someone is there "for the women and their babies." This may create the misperception that a local group of sidewalk counselors exists primarily as an adjunct to these more publicized protests. The truth is usually, however, that the sidewalk counselors have been consistently and quietly present at the clinics, but have only been noticed by the media when they are present on a day when a larger protest or clinic blockade occurs.

The methodology of sidewalk counseling is generally to be friendly, helpful, and nonoffensive. Thus, sidewalk counselors are instructed to "smile" because "people won't stop for a grump."[21] They are told not to "yell" because "[p]eople at a distance generally have a difficult time hearing you, and they will hear it as condemnation, even if you're saying something nice."[22] Similarly, sidewalk counselors are told not to "run toward a mother" because this is "very intimidating."[23] Sidewalk counselors are also instructed not to block clinic driveways.[24] However, sidewalk counselors often face the pressures of hostile abortion clinic staff, and paid or volunteer "clinic escorts," whose primary goal seems to be to prevent the sidewalk counselors from speaking with clinic clients. Clinic staff at times can be verbally abusive, physically violent, or file false charges. Thus sidewalk counselors, out of considerations of safety, are told to counsel in small groups.[25] One reason that sidewalk counselors generally prefer to counsel when there are no other protests is that there are generally fewer clinic escorts.

Sidewalk counselors are sustained in their efforts by a steady stream of women who respond positively to their offers

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[21] *Id.* at 5.

[22] *Id.* at 4.

[23] *Id.*

[24] *Id.*

[25] *Id.* at 3; Jeannie Hill, *Sidewalk Counseling Workbook* 5, 8 (1986) (printed by Sidewalk Counselors for Life, Inc., Denver, Colorado).

of assistance, care, and information. These women are often quite grateful to the sidewalk counselors for reaching them when they were on the verge of aborting. In addition, sidewalk counselors have the joy of seeing many babies born who otherwise would have been aborted. For example, sidewalk counselors in Birmingham, Alabama reported a "confirmed 93 babies saved" during 1993 in their January 1994 newsletter.[26]

III. This Court Has Recognized That Prolife Speech Addressed to Women Considering Abortion Can Further the Liberty and Health of Pregnant Women.

This Court recognized in *Planned Parenthood v. Casey* that a woman's liberty interest includes both the choice to abort, and the choice to carry a pregnancy to term. *See Casey*, 112 S. Ct. at 2811. This understanding of the woman's liberty interest led the Court to acknowledge that the "woman's right to make the ultimate decision" does *not* include "a right to be insulated from all others in doing so." *Id.* at 2821. Thus, the State was permitted to "express profound respect for the life of the unborn," *id.* at 2821, so long as the ultimate decision was left to the woman. The Court recognized that "most women considering an abortion would deem the impact on the fetus relevant, if not dispositive, to the decision," *id.* at 2823, and recognized the "risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed." *Id.* at 2823. Thus, informed consent statutes were viewed by this Court as potentially helpful to the "psychological well-being," and hence "health," *id.* at 2823, of women, as such statutes minimized the risk of severe psychological trauma and ensured a "more informed and deliberate," *id.* at 2825, decision.

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[26] The Birmingham Sidewalk Counselor, Vol. II, Issue 1, at 1 (January 1994).

IV. This Court Correctly Assumed That Abortion Counseling as Practiced in Abortion Clinics Typically Fails to Apprise Clients of Information Which Most Women Would Find Morally Relevant to the Abortion Decision.

This Court's acceptance of the positive benefits of informed consent statutes suggests a recognition that abortion counseling as practiced in abortion clinics typically does not apprise clients of either the facts of fetal development or of "the impact [of abortion] on the fetus." *Casey*, 112 S. Ct. at 2823. Members of this Court, well before *Casey*, had noted the generally inadequate nature of the counseling provided at abortion clinics. Justice O'Connor had noted that the physician-patient relationship "is nonexistent." *City of Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 473 (1983) (O'Connor, J., dissenting). Justice Stewart had noted that abortion counseling "is typically limited to a description of abortion procedures, possible complications, and birth control techniques," and that the "physician had no prior contact" with the pregnant woman before the actual abortion procedure. *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 n.2 (1976) (Stewart, J., concurring). Thus, the government speech permitted, but not required, in *Casey*, allowed the state to further the liberty and health of pregnant women, and to seek to protect the life of the unborn child, by informing the pregnant woman of relevant matters which most abortion providers avoid.

The failure of abortion counseling within clinics to address fetal development and other relevant facts is deliberate. Abortion counselors, for example, are trained to refer to the fetus as a "product of conception" or as "tissue." Carole Joffe, *The Regulation of Sexuality* 94 (1986). While this terminology may appear "neutral" to some, *see id.*, it can create the misleading impression that the fetus bears no physical or functional resemblance to a human infant. Abortion clinic personnel generally believe that abortion is a morally adequate response to an unwanted pregnancy, *id.* at 115, and apparently choose to avoid apprising their clients of facts which may lead some of their clients to a contrary conclusion. Thus,

abortion counseling within clinics generally seeks to assure the woman that the abortion procedure is not particularly painful. *See id.* at 94 (abortion counselors trained to uses words like "pinprick" and "discomfort" and to avoid using word "pain"). The question of abortion alternatives, if it is addressed at all, focuses narrowly on the question of whether a woman really wants to abort this pregnancy, while generally avoiding facts (such as fetal development) relevant to the fundamental question of whether aborting an unwanted pregnancy is moral. The latter question may, however, in the long-term weigh heavily upon women, as reflected, for example, in one survey which found that one-third of aborting women agreed with the statement that "abortion is murder." *See* Skelton, *Most Americans Think Abortion is Immoral*, L. A. Times, March 19, 1989, at 1. It cannot be easy, in the long-term, to believe that one has commissioned the murder of one's child.

The failure of abortion clinics to apprise their clients about the facts of fetal development, and of other issues related to the fetus, is not accidental, but rather is part of a broader attempt to shield women from the realities of abortion. For example, ultrasound is often used as a diagnostic technique in obstetrical practice, and thus abortion clinic personnel view the live fetus within the womb prior to the abortion. *See, e.g.*, Warren Hern, *Abortion Practice* 69-73 (1990 reprint). Abortion clinic personnel, however, hide the ultrasound screen from their clients. *See* Diane M. Gianelli, *Abortion Providers Share Inner Conflicts*, Am. Med. News, July 12, 1993, at 3, 37. Similarly, it seems to be a regularly practice to hide the dismembered fetal parts from the aborting woman, based on the rationale that "[s]he's probably not prepared for what she's going to see." *Id.* at 37. The medical literature further expresses a preference for abortion techniques that will permit the patient to "avoid[] the implications of the procedure" by avoiding contact with the fetus. *See, e.g.*, Nancy B. Kaltreider, et al., *The Impact of Midtrimester Abortion Techniques on Patients and Staff*, 135 Am. J. Obstet. Gynecol. 235, 236 (1979). This avoidance allows "the patient to continue her characteristic pattern of denial and have a smooth psycho-

logical course." *Id.* at 238. Thus, current abortion practice is specifically designed to separate the aborting woman from the act of abortion and ensure that someone other than the woman is the primary moral and physical actor in the task of killing and removing the fetus. *See generally* David M. Smolin, *Cultural and Technological Obstacles to the Mainstreaming of Abortion*, 13 St. Louis Public Law Rev. _____ (forthcoming March 1994).

V. The Amended Injunction is Based on a View of the Health and Liberty of Women that Was Rejected by This Court in *Planned Parenthood v. Casey*.

The trial judge justified the amended injunction in terms reminiscent of *Thornburgh v. ACOG*'s rejection of informed consent statutes. Thus, the amended injunction was based in part on the abortionist's testimony that abortion protests caused patients "a higher level of anxiety," 626 So.2d at 678 (finding I), while *Thornburgh*'s rejection of informed consent statutes was based in part on the Court's view that information about the fetus would "heighten [the woman's] anxiety." 476 U.S. at 762. The amended injunction relies on the abortionist's view that prolife speech is bad for the "health" of women considering abortion, while *Thornburgh* allowed abortionists as a class to determine the amount and kind of knowledge about abortion that women would receive.

Abortion clinic practice is predicated on the belief that avoidance of the reality of abortion, in terms of fetal development and the impact on the fetus, best facilitates the health and liberty of women. *See* section IV, *supra*. Abortionists as a class generally share this view, and thus will generally be available to testify that prolife speech negatively affected the liberty and health of women. Abortion practice, abortionists, *Thornburgh*, and the amended injunction share this basic premise that prolife speech which forces women to face the facts of fetal development, and the reality of abortion, significantly interferes with the health and liberty of women.

This Court in *Planned Parenthood v. Casey* overruled *Thornburgh* on these relevant premises about the liberty and health

of women. *Casey* properly takes a more long-term view of women's health. Censoring prolife speech may make it easier for the woman to abort, and may thereby protect women from a certain measure of pre-abortion anxiety and stress. This reduction in anxiety and stress must be measured against the "devastating psychological consequences," *Casey*, 112 S. Ct. at 2823, of discovering the facts of fetal development, and of what abortion does to the fetus, *after* the abortion. *Casey* further rejects *Thornburgh*'s premise that protecting women from accurate information about fetal development and alternatives to abortion furthers the woman's liberty. *Casey* instead holds that a woman who is well-informed is better able to exercise her liberty interest in deciding whether *or not* to abort. *See Casey*, 112 S. Ct. at 2822-26.

VI. The Amended Injunction Improperly Extends the Flawed Reasoning of *Thornburgh* to Private, Rather than Governmental, Expression.

Even if *Thornburgh*'s flawed analysis of the health and liberty of women were accepted, it would not justify the broad amended injunction. First, the activities of nongovernmental actors, even if they go far beyond the bounds of expression protected by the first amendment, cannot violate the abortion liberty, because the due process clause applies only to *state* deprivations of liberty. *See Bray v. Alexandria Women's Health Clinic*, 113 S. Ct. 753, 764 (1993). Second, the nonviolent expression of private individuals and associations is protected by the free speech clause even if it is offensive or controversial. *See Claiborne Hardware*, 458 U.S. at 911.

The governmental speech permitted by *Casey* was characterized by the Court as "truthful, nonmisleading information." 112 S.Ct. at 2823. *Amici* believe that much prolife speech by private individuals and associations, including particularly speech by sidewalk counselors, meets the *Casey* standards for *governmental* speech. It is highly ironic that the amended injunction forbids *private* parties located on a public forum outside of an abortion clinic from engaging in a kind of speech that this Court permits even to the *government*

within the abortion clinic. Surely private individuals in a public forum have greater free speech rights than does the government acting within a private facility. However, private parties should not be subject to the limitations of governmental speech as articulated in *Casey*, as such a result would create special disabilities for prolife speakers in violation of the free speech clause. The free speech clause permits both prolife and abortion rights speakers a degree of freedom in content and form of expression which is unavailable to the government.

CONCLUSION

These amici urge the Court to protect the free speech and associational rights of prolife individuals and associations, and particularly of sidewalk counselors, and to protect the corollary rights of women considering abortion to receive offers of assistance, care, and information that will assist some in choosing childbirth. The amended injunction should be held unconstitutional as a content and viewpoint based restriction on free speech, as an unconstitutional prior restraint on free speech, and as a violation of the First Amendment's protections of free speech and association. The trial court's punishment of all prolife individuals and associations, for the alleged wrongdoing of a few, should be rebuffed.

The decision of the Florida Supreme Court upholding the amended injunction should be reversed.

Respectfully submitted,

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